BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY C. GLENN, JR.	)	
Claimant	)	
	)	
VS.	)	
	)	
UNIVERSITY OF KANSAS	)	
HOSPITAL AUTHORITY	)	
Respondent	)	Docket No. 1,047,235
	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the January 7, 2011 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on April 20, 2011.

APPEARANCES

Timothy M. Alvarez, of Kansas City, Kansas, appeared for the claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that in the event this claim is found to be compensable, the claim should be remanded to the ALJ for further proceedings and findings on the remaining issues consistent with this Order.

ISSUES

The ALJ found claimant failed to establish that is was more probably true than not that he sustained an accidental injury arising out of and in the course of his employment with respondent on or about May 6, 2009. He further concluded that claimant failed to give timely notice of his alleged injury as required by K.S.A. 44-520. Thus, claimant failed to sustain the requisite evidentiary burden and his claim for workers compensation benefits was denied.

The claimant requests review of the ALJ's Award, alleging the Award should be reversed. Claimant acknowledges that the precise date of his accident, originally believed to be May 6, 2009, may be inaccurate. But claimant nonetheless maintains he was engaged in patient care in the normal course of his work duties sometime in early May 2009, when he injured his left knee while transferring a patient from a chair to the bed. He further contends that he told Amy Rice, a nurse and someone he considers his supervisor, of his accident immediately after it occurred, thereby satisfying the statutory requirements set forth in K.S.A. 44-520. In sum, claimant believes the greater weight of the evidence supports his assertion that he sustained an accidental injury in early May 2009, while transferring a patient and that he gave notice of that injury on the same date. Accordingly, claimant asks the Board to reverse the ALJ's conclusion as to the compensability of his accident and remand the claim for further proceedings and findings on the remaining issues.

Respondent contends that the Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The issue to be determined on appeal is rather straightforward. This Board must decide whether claimant sustained his burden of proving 1) he sustained an accidental injury arising out of and in the course of his employment on or about May 6, 2009, and 2) he gave notice of that injury as required by K.S.A. 44-520. If both of those issues are resolved in claimant's favor, the parties concede the claim must be remanded to the ALJ for further findings and conclusions. However, if *either* issue is resolved in respondent's favor, then the ALJ's Award must be affirmed.

The ALJ's Award recites a summary of the depositions taken in this matter and rather than unnecessarily recite that information, the Board will simply refer to those facts that are most pertinent to this decision.

Claimant was employed as a health care technician, charged with providing patient care for patients involved in bone marrow transplants. Claimant alleges an injury occurred on May 6, 2009 while he was transferring a patient from chair to bed. He described his left knee become pinned during the procedure and how he felt a "pop" followed by an electrical sensation running down his leg.[1] Claimant goes on to testify that after he completed his patient care, he left the room and immediately told Amy Rice, the woman he repeatedly describes as the charge nurse on the floor, a woman who he considers to be his supervisor.

According to claimant, Ms. Rice examined the knee and gave him a lab bag filled with ice to use as a method of limiting the swelling. In fact, claimant says Ms. Rice did this at least 3 times over the next few months.[2] He also testified that he was no longer able to transfer patients as a result of his injury and self-limited his activities while working.[3]

Claimant made a conscious decision not to report this accident through the normal procedure as he had previously been disciplined for his attendance issues. He was concerned that he might lose his job so he elected not to notify anyone of the injury through the formal process.[4]

Claimant sought treatment with his private physician and ultimately was referred to Dr. Vincent H. Key. Dr. Key had claimant undergo an MRI and claimant was diagnosed with a torn ACL. Surgery was scheduled for July 20, 2009. In anticipation of this surgery, claimant notified Jani Rothermel, the workers compensation coordinator, and told her of his need for surgery. Shortly thereafter, claimant was asked to fill out an accident report but the surgery continued as scheduled. Claimant has since been terminated for attendance issues.

Respondent has denied the compensability of this accident primarily on two fronts. First, respondent came forward with evidence that unquestionably shows that the patient claimant alleges he was tending to was not assigned to the unit where he was working on May 6, 2009. She had been in that unit on a frequent basis, but had not been there since May 2, 2009. Thus, respondent contends the accident could not have occurred as he alleges.

Next, respondent offered Amy Rice's testimony during which she denied nearly all of claimant's factual assertions. She denies that she was claimant's supervisor on May 6,

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[1] R.H. Trans. at 8-9.

[2] *Id.* at 13.

[3] *Id.* at 20.

[4] *Id.* at 28-29.

2009. While there were certain isolated shifts that she would serve as the charge nurse, as a general rule she was not the charge nurse and served solely as a unit nurse, who delegates duties to claimant or other technicians during the course of a shift. Ms. Rice could not hire or fire employees, she could not discipline employees nor could she excuse employees from work.

Additionally, Ms. Rice denies that claimant ever told her of an instance where he hurt his knee while transferring this particular patient on May 6, 2009 while they were both working on the unit or at any other time. She testified that he complained of an old injury to his left knee, but at no point did he ever tell her of any work-related event that caused him injury to his left knee. She goes on to specifically deny that she ever examined claimant's knee for an injury, offered any sort of ice packs, or helped him wrap his knee at any point in time while the two of them were working together.

Ms. Rice acknowledges she had a personal relationship with the claimant at one point and that she does not hold him in high esteem as a result of that relationship. Nonetheless, she remains steadfast that she had no knowledge of claimant sustaining any injury while working for this respondent. It is worth noting that Ms. Rice has gone on to another position within respondent's organization and no longer works in the same position as she had in May 2009.

The balance of the evidence in the record is generally in agreement. Claimant acknowledges that other than his conversations with Ms. Rice (which are disputed) he gave no one else notice of his injury and in fact, preferred to handle his medical treatment through his own personal health insurance program. He gave his first notice to the workers compensation department on July 15, 2009, which led to him completing a written accident report which was dated July 20, 2009, just before his scheduled surgery on July 21, 2009. This report recites May 6, 2009 as the date the accident occurred.

The ALJ concluded that claimant failed to meet his evidentiary burden of establishing an accidental injury arising out of and in the course of his employment on May 6, 2009. He also concluded that claimant failed to give notice to his employer as required by K.S.A. 44-520. Thus, claimant's request for an award was denied and this appeal followed.

The Workers Compensation Act, K.S.A. 44-501 et seq. places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's

[5] K.S.A. 2008 Supp. 44-501(a).

position on an issue is more probably true than not true on the basis of the whole record."[6] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[7]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such

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[6] K.S.A. 2008 Supp. 44-508(g).

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[8] K.S.A. 2008 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[10] *Id.*

> notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

As noted above, claimant bears the burden of establishing that he sustained a compensable accident. This includes the obligation to persuade the trier of fact that he sustained an accidental injury arising out of and in the course of his employment with respondent *and* that he gave timely notice of his injury as required by K.S.A. 44-520. The failure of either of these two elements is fatal to claimant's claim.

The Board has carefully reviewed the evidence contained within the record and concludes the ALJ's Award should be affirmed. The ALJ's Award makes the following finding:

> Based upon the foregoing, claimant has failed to established [sic] as more probably true then [sic] not that he sustained an occupational injury arising out of and in the course of his employment with respondent on May 6, 2009.[11]

His Award also indicates that "[c]learly, claimant did not provide such notice to any individual in a supervisory capacity with the respondent."[12]

Like the ALJ, the Board has difficulty accepting claimant's recitation of the events relating to his accident. From the outset, claimant has alleged an accidental injury on May 6, 2009. His assertion remained steadfast, even referencing a specific patient was involved at the time of his accident. When it became clear that the patient he identified was not assigned to his unit on May 6, 2009, thus leaving the impression that the accident could not have occurred as claimant alleges, claimant explained that possibly his recollection as to the date could be faulty. This is not the only problematic component to this claim which erodes claimant's credibility.

Claimant also offered specific details about how Mr. Rice examined his knee immediately after his injury, treated his symptoms with an ice pack, even doing so at least 3 times over the next few months, and he assumed as his supervisor that she would relay

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[11] ALJ Award (Jan. 7, 2011) at 6.

[12] *Id.*

all this information to the appropriate person in the chain of command. Yet, it is clear from the testimony of both Ms. Rice and Victoria Rudolph, a woman who quite clearly *is* claimant's supervisor, that Ms. Rice does not serve as a supervisor (except on very rare occasions) and that she has no supervisory powers with respect to this claimant. Both Ms. Rice and Ms. Rudolph were working on May 6, 2009, but both these women deny any conversation with claimant relating to a knee injury. Ms. Rice denies ever helping claimant treat his knee, or discussing an injury resulting from a patient transfer on May 6, 2009 or at any other time.

Simply put, both versions of the events cannot be true. Like the ALJ, the Board is not persuaded that claimant sustained an accidental injury arising out of and in the course of his employment with respondent on May 6, 2009 or at any other time. The greater weight of the evidence supports the ALJ's conclusion that claimant failed to meet his evidentiary burden as to the establishment of a work-related injury on or about May 6, 2009. This conclusion is fatal to claimant's claim.

Likewise, the Board is unpersuaded that claimant provided the statutorily required notice. Claimant contends that his discussions with Ms. Rice immediately after his alleged accident, as well as her treatment of his complaints, satisfies the requirement that he notify respondent of his accident. K.S.A. 44-520 requires notification to respondent and this is satisfied by notifying a supervisor, not merely a co-worker.[13] Claimant's brief implicitly admits that this conversation is the only evidence which could arguably satisfy the 10-day statutory requirements. The Board does not find claimant's recitation of these conversations to be credible.

Here, setting aside whether the events are true as alleged, the greater weight of the evidence shows that Ms. Rice was not a supervisor on May 6, 2009. It may well be that claimant was required to report certain patient information to Ms. Rice during the course of their mutual shift and she may well have delegated tasks to him as a normal course of their routine. But those acts do not transform her position from co-worker to supervisor. The delegation and dialogue between the two of them was required as a normal course of their job duties as co-workers. She had no ability to fire or discipline claimant, nor could she excuse him from work duties. Thus, like the ALJ, the Board concludes that even if events transpired as claimant says, claimant nonetheless failed to give the statutorily required notice within 10 days.

The ALJ's Award is affirmed in all respects.

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[13] *Marconette v. Goodart Construction*, No. 1,006,107, 2003 WL 359845, (Kan. WCAB Jan. 29, 2003); *Strain v. Dillard's*, No. 253,015, 2001 WL 641610 (Kan. WCAB May 30, 2001); *Petrie v. Herrman's Excavating, Inc.*, No. 248,296, 2000 WL 1277569 (Kan. WCAB Aug. 30, 2000).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated January 7, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge